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Supreme Court of the United States

October Term, 1998

ELOISE ANDERSON, Director, California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; PETE WILSON, Governor of the State of California; and CRAIG L. BROWN, Director, California Department of Finance,

Petitioners,

v.

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice is a nonprofit, public interest legal center committed to defending the essential foundations of a free society and securing greater protection for individual liberty. The Institute has a particular interest in securing the natural rights and liberties of citizens of the United States and removing unlawful barriers to the pursuit of an economic livelihood. Counsel of record for the Institute's brief is Professor Douglas W. Kmiec, a leading scholar of constitutional law, who previously served as Principal Deputy and Assistant Attorney General of the United States, Office of Legal Counsel, U.S. Department of Justice during the years 1985-89.

SUMMARY OF ARGUMENT

The California statute should be sustained, and the Ninth Circuit decision reversed. The Court's rationale in *Shapiro v. Thompson*, 394 U.S. 618 (1969), has no basis in constitutional text or history and should be discarded. There is a fundamental right to migrate. It is secured by the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment. This fundamental right is one of the general, natural rights promised to all citizens of the United States. The existing privileges and immunities jurisprudence of this Court depends upon a careful

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[1] In conformity with Supreme Court Rule 37, the Institute for Justice has obtained the consent of the parties to the filing of this brief and letters of consent have been filed with the Clerk. The Institute also states that counsel for a party did not author this brief in whole or part; and that no persons or entities other than *amicus*, its members, and its counsel made a monetary contribution to the preparation and submission of the brief.

judicial identification of "those 'privileges' and 'immunities' bearing on the vitality of the Nation as a single entity." *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279 (1985) (citing *Baldwin v. Fish and Game Comm'n of Montana*, 436 U.S. 371, 383 (1978)). That jurisprudence is necessarily supplemented by this Court's modern recognition that the discernment of broad constitutional language like that in Article IV and the Fourteenth Amendment requires reference to the traditions and history of the Nation most frequently identifiable in the common law.

Under the rule of law of our Constitution, the Justices of this Court are neither free to create fundamental rights at will, as the Court did in *Shapiro*, nor disregard textual fundamental rights like those encompassed in the Bill of Rights or those additional privileges and immunities protected by Article IV, such as the right to migrate to a new state to pursue a lawful occupation. Should this Court decide to reverse the Ninth Circuit, as we believe the Constitution as written warrants, care must be taken not to disregard either aspect of the Court's Article III duty.

Respondents' claim that they possess a fundamental right to increased welfare benefits solely as a result of migration is premised upon over-broad constitutional improvisation. It has mooring in neither constitutional text nor common law tradition, and should be rejected. California has ample rational basis to sustain its welfare structure premised upon the empirical studies of so-called "welfare magnetism." Such welfare-induced migration threatens to undermine the welfare system through either an inundation of new claimants overwhelming state resources or a defensive lowering of benefits resulting in a "race to the bottom" adversely affecting all potential claimants. California is attempting

to avoid these consequences with a two-tier welfare structure that maintains a new resident's prior assistance level for one year and increases it to the usually higher California levels thereafter. Whether or not the two-tier structure is the best policy choice, it surely is a reasonable one for California to pursue.

ARGUMENT

I. THE RIGHT TO MIGRATE IS A PRIVILEGE AND IMMUNITY GUARANTEED UNDER ARTICLE IV AND THE FOURTEENTH AMENDMENT.

Article IV, Section 2 of the Constitution provides that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." In *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Supreme Court declined to locate the right to migrate, including the right to travel, in any particular clause of the Constitution. However, as Justice O'Connor first observed in *Zobel v. Williams*, 457 U.S. 55 (1982), and later reaffirmed in *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986), where she was joined by Chief Justice Rehnquist and Justice Stevens:

> the Privileges and Immunities Clause of Art. IV, § 2, of the Constitution supplies the relevant basis for analysis in evaluating claims . . . where the principal allegation is that the state scheme impermissibly distinguishes between state residents, allegedly imposing a relative burden on those who have more recently exercised their right to establish residence in the State.

Id. at 920 (O'Connor, J., dissenting).

A. The need to return to first principles.

To answer the question accepted for review in this case, it is necessary to return to first principles – that is,

to a position consistent with the text and history of the Constitution. As discussed more fully in section II of this brief, *Shapiro*'s lack of textual analysis and sweeping equal protection theory is an unjustified invitation to federal courts to displace rational legislative choices made by state and local governments that do not truly implicate express or historically implied fundamental rights. The confusion spawned by *Shapiro* is well-illustrated by *Soto-Lopez*, itself, where, as one commentator put it, "the right to migrate doctrine [was left] in disarray." Todd Zubler, *The Right to Migrate and Welfare Reform: Time for Shapiro v. Thompson to Take A Hike*, 31 Val. U. L. Rev. 893, 906 (1997). Indeed, the inherent flaw of the *Shapiro* rationale was identified in that case by Justice Harlan, whose dissenting opinion observed that because "[v]irtually every state statute affects important rights," the equal protection theory employed by the majority "creates an exception which threatens to swallow the standard equal protection rule." *Shapiro*, 394 U.S. at 661 (Harlan, J., dissenting). *Shapiro*'s rationale must be re-examined and re-anchored on textual constitutional ground, or it will continue to mislead lower courts and unnecessarily constrain state authority.

Again, as Justice O'Connor so well illustrated in *Zobel*, the Article IV Privileges and Immunities Clause has "enjoyed a long association with the rights to travel and migrate interstate." *Zobel*, 457 U.S. at 79 (O'Connor, J., concurring). The Clause derives from Article IV of the Articles of Confederation, which expressly recognized a right of "free ingress and regress to and from any other State" as well as the "privileges and immunities of free citizens in the several States." The drafter of the subsequent constitutional Article IV, Charles Pinckney, observed to the convention that the Article was "formed

exactly upon the principles of the 4th article of the present Confederation." 3 M. Farrand, *Records of the Federal Convention of 1787* 112 (1934). And the identity of purpose of the two provisions, notwithstanding the folding of the ingress and regress right into the more general privileges and immunities language, has never been doubted.[2]

B. The two aspects of privileges and immunities: nondiscrimination and substantive natural rights.

It is important to emphasize that the historical meaning of the Privileges and Immunities Clause was twofold: securing movement (ingress and regress) or migration (settlement in a new state) and also more profoundly, "to secure the free inhabitants of each of these states . . . all privileges and immunities of free Citizens in the several States"[3] (that is, the natural rights of citizenship "in the several States," which as an historical matter was synonymous with the later usage "in the United States").

Contrary to the implications of *Shapiro*, the right to migrate has no genesis in the Equal Protection Clause; rather, it is a descendant of Article IV Privileges and Immunities and now the Fourteenth Amendment as well. Insofar as *Shapiro* overlooked this Court's Article IV jurisprudence, it created two errors. First, it set the Court on

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[2] For example, Chief Justice White in *United States v. Wheeler*, 254 U.S. 281, 294 (1920) held that "the text of Article IV, Section 2, of the Constitution, makes manifest that it was drawn with reference to the corresponding clause of the Articles of Confederation and was intended to perpetuate its limitations; and . . . that view has been so conclusively settled as to leave no room for controversy."

[3] Articles of Confederation art IV.

an interpretative voyage unable to sustain in a principled way any distinction between new and old residents drawn by the States, whether or not these distinctions were intended to affect migration or had that effect. Second, and of a more insidious nature, *Shapiro* cast doubt on this Court's ability to protect those vital, but unenumerated, fundamental rights that can be traced "to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." *Michael H. v. Gerald D.*, 491 U.S. 110, 127-28 n.6 (1989).

The claim that California's two-tier welfare benefit structure offends an historically relevant tradition protecting the unenumerated right to migrate is untenable. To be sure, distinctions among classes of residents in terms of common law-grounded privileges and immunities, such as the right to acquire and possess property or the right of every citizen "to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or . . . to institute and maintain actions of any kind in the courts of the state. . . . " *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), certainly invite heightened scrutiny like that employed by this Court in *Supreme Court of New Hampshire v. Piper*. Thus, for example, any attempt by California to prevent Nevada plumbers from migrating into the Golden State to practice their occupation would trigger heightened scrutiny. But the statute at issue here implicates no such concerns that can be grounded in history or tradition.

The Court is invited in this case to locate the right to migrate in constitutional text rather than leave it, as Justice O'Connor aptly put in her *Soto-Lopez* dissent, "free-floating." We urge the Court to follow the original textual meaning of the Privileges and Immunities Clauses

in their entirety. See *Soto-Lopez*, 476 U.S. at 918. The unspoken assumption of both Article IV and Fourteenth Amendment Privileges and Immunities is that they have substantive content *in addition* to their promise that a receiving state shall not exclude altogether or invidiously discriminate against incoming residents with regard to state-granted rights and privileges. Legal historian Chester James Antieau writes, for example, "At the time the Articles of Confederation were adopted the overwhelming majority of Americans accepted the doctrine of natural rights. All men possessed certain basic, fundamental rights which the government could not deny." Chester James Antieau, *Paul's Perverted Privileges or the True Meaning of The Privileges and Immunities Clause of Article Four*, 9 Wm. & Mary L. Rev. 1, 4 (1967). In unexamined ways, however, perhaps because of the unprincipled example of *Shapiro* and its unacknowledged forebear, *Lochner v. New York*, 198 U.S. 45 (1905), the Court's recent Article IV case law has been casually dismissive of natural rights in the historical record. See *Piper*, 470 U.S. at 281 n.10 (1985) (in dicta and without explanation describing our natural rights as "discarded").

C. The natural rights content of the Privileges and Immunities Clause is both textual and derived from relevant common law tradition.

Natural rights are identifiable and enforceable. For example, in the due process context in *Michael H.*, and the Court's prescribed antecedent inquiry into background principles of state property law in recent application of the Taking Clause's protections, see *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court has located natural rights in the identification of "relevant

traditions" of the state common law. Such close examination of history and practice is an apt model for the description of natural rights shielded as a privilege or immunity. The Court's approach for identifying such privileges and immunities is consistent with venerable originalist sources. In 1797, Judge Chase opined that one of the privileges and immunities of citizens of the several States was the right "to acquire and hold real property in any of the states." *Campbell v. Morris*, 3 H. and McH. 535, 553 (Md. 1797). Again, in 1821, Article IV was construed in the Delaware Chancery Court where Justice Ridgely stated: "The words 'privileges and immunities' comprehend all the rights, and all the methods of protecting those rights, which belong to a person in a state of civil society, subject to be sure, to some restrictions, but to such only as the welfare of society and the general good require." *Douglas v. Stephens*, 1 Del. Ch. 465, 469 (1821). In the same case, Chief Justice Johns observed that "[t]he privileges and immunities secured to all citizens of the United States are such only as belong to the citizens of the several States; which includes the whole United States, and must be understood to mean, such privileges as should be common in the Union." *Id.* at 477. This coincides well with Joseph Story, who wrote in his famous Commentaries, "The intention of this clause was to confer on them, if one may so say, a general citizenship; and to communicate all the privileges and immunities, which the citizens of the same state would be entitled to under the like circumstances." 3 Joseph Story, *Commentaries on the Constitution of the United States*, section 1800 at 674-75 (photo. reprint 1991) (Boston, Hilliard, Gray & Co. 1833). Hamilton made plain that he, too, understood the words "privileges and immunities of the citizens of the several States" as the equivalent of not just

those privileges simply granted by a second state to a citizen migrating from another, but the privileges and immunities of United States citizens. The Federalist No. 80 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

While Chief Justice Roger Taney grievously would later find African-Americans to be incapable of citizenship and misconstrued the Due Process Clause in the catastrophic decision of *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), even he recognized:

> if persons of the African race are citizens of a State, and of the United States, they would be entitled to all of these privileges and immunities in every State, and the State could not restrict them; for they would hold these privileges and immunities under the paramount authority of the Federal Government, and its courts would be bound to maintain and enforce them, the Constitution and laws of the State to the contrary notwithstanding.

Id. at 423. Justice Curtis' view in *Scott* was much the same: "Nowhere else in the Constitution is there anything concerning a general citizenship; but here, privileges and immunities to be enjoyed throughout the United States, under and by force of the national compact, are granted and secured." *Id.* at 580.

Later, the "[u]tterances of our national leaders in both the United States Senate and the House of Representatives during the mid-nineteenth century provide irrefutable evidence that legislators were in complete agreement with the judiciary that the privileges and immunities to be protected by Article Four were the basic, fundamental, natural rights of men." Antieau, *supra*, at 15. In the 35th Congress, for example, Congressman Bingham, who would later play a pivotal role in the drafting of the Fourteenth Amendment, stated that the

privileges and immunities secured by Article IV were "those rights, common to all men [which] no man or state may rightfully take away." *Cong. Globe*, 35th Cong., 2nd Sess. 984 (1858).

D. As a matter of original understanding, citizens may assert privileges and immunities against their own State.

It is sometimes claimed that Article IV provides no protection to a citizen from his own State. See, e.g., *Maldonado v. Houstoun*, No. 97-1893, 1998 U.S. App. LEXIS 21909 (3d Cir. Sept. 9, 1998) n.9 (dismissing an Article IV and Fourteenth Amendment claim on this basis). Historically, of course, this doubt was part of the impetus for the Fourteenth Amendment. Yet, even before that Amendment, legal historians record that it was the "assumption throughout [the] years previous to 1868, entertained by jurists, legislators and scholars [ ] that proper constitutional law would not permit a state to strip its own citizens of their natural rights, and that the Privileges and Immunities Clause of Article Four would equally protect citizens from other states if they were ever exposed to the denial of such rights." Antieau, *supra* at 21. A similar point was raised and answered by Justice O'Connor in *Zobel* when she urged that the Court put the *Shapiro* travel right on a textual footing. She wrote: "It could be argued that Alaska's scheme does not trigger the Privileges and Immunities Clause because it discriminates among classes of residents, rather than between residents and nonresidents." 457 U.S. at 75. But the timing of the discrimination, continued Justice O'Connor, "does not

insulate Alaska's scheme from scrutiny under the Privileges and Immunities Clause." *Id.*[4]

Some of the confusion over whether Article IV is both a substantive guarantee capable of assertion against one's own State as well as a nondiscrimination principle is traceable to the Court's decision in *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869), where Justice Field emphasized the nondiscrimination side of Article IV. Field wrote: "the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their constitution and laws by virtue of their being citizens." *Id.* at 180. It is error, however, to see this statement as foreclosing the fundamental rights protection of the Privileges and Immunities Clause. In context, it does not. Indeed, in light of the interpretative method applied by the modern Court in *Michael H.* already alluded to, it can fairly be read to mean merely that the content of protected privileges and immunities are likely best identified out of the common law of the States – that is, to use Field's somewhat infelicitous phrasing, rights "common to the citizens in the latter States." *Id.* Reading Field's statement as merely a principle of nondiscrimination disregards the dual purposes of the Clause as set out above, and also leads to the absurd consequence that "if a person from

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[4] Justice O'Connor did note that the Clause might not be offended by an age-based discrimination applied evenhandedly to old and new residents. *Zobel*, 457 U.S. at 75-76 n.6. This, of course, is true, but only because there is no textual or historically grounded common law right implicated by such age differentiation. It is not merely because old resident and new resident under the Justice's hypothetical would be treated alike.

New York, for example, went to Mississippi and was totally denied freedom of speech, assembly, movement, petition, press, access to the courts, and even the writ of habeas corpus, it would all be constitutional so long as the citizens of Mississippi had regularly been denied the same rights!" Antieau, *supra* at 22. Of course, no state could infringe the express Bill of Rights, but only because the judiciary has reasoned that these textual rights were intended to be incorporated against the States through the Fourteenth Amendment. It would be formalistic in the extreme for the Court not to maintain the same treatment for unenumerated privileges and immunities due all citizens of the United States like the right to acquire and possess property, pursue a lawful occupation, and migrate.

These fundamental natural rights are not the products of judicial whim. As the Court has held, the character and scope of such rights are to be determined largely in relation to the whole tradition and history of the common law in the States, themselves. Indeed, two years after *Paul v. Virginia*, the Court decided *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1871), in which the Court defined the privileges and immunities of Article IV as those anchored in "the common law." Elaborating, the Court stated in *Ward* that the Clause "plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business, without molestation; to acquire personal property; [and] to take and hold real estate. . . . " *Id.* at 430.

E. *Slaughter-House* did not slaughter the natural rights protected by the Privileges and Immunities Clause.

The standard teaching at this point may be to say that this history of natural rights protection is all well and good, but the Court's 5-4 decision in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1871) nullifies privileges and immunities altogether. This is an over-reading of *Slaughter-House*, but a common and deceiving one. It is deceiving because, at worst, Justice Miller's majority opinion limiting the Privileges or Immunities Clause that had been inserted into the Fourteenth Amendment leaves Article IV unaffected. That this is true is apparent from Justice Field's dissent in *Slaughter-House* in which he references and approves the list of privileges in *Corfield v. Coryell*. Justice Field, the author of the ambiguous *Paul* opinion just a few years earlier, writes unambiguously on this occasion: "The privileges and immunities designated are those *which of right belong to the citizens of all free governments*." *Id.* at 97 (Field, J., dissenting) (emphasis in the original). There is nothing ambiguous about that.

Volumes could, and have been written, criticizing the crabbed and ahistorical opinion written by the narrow majority in *Slaughter-House*.[5] As one author noted, "The history of abuses that led to the Amendment received

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[5] See, e.g., David A. J. Richards, *Conscience and the Constitution: History, Theory, and Law of the Reconstruction Amendments* 204-17 (1993); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 100 Yale L.J. 1193, 1257-59 (1992); William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 156-64 (1988); Walter F. Murphy, *Slaughter-House, Civil Rights, and the Limits on Constitutional Change*, 32 Amer. J. of Juris. 1, 1-8 (1987).

superficial and cursory attention at best," while the Amendment's legislative history "received no attention at all." Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 173, 175 (1986). It is not necessary to recount here how the Court in *Slaughter-House* disregarded the debates over the Freedmen's Bureau Bill, the companion 1866 Civil Rights Act, and the Fourteenth Amendment. It is enough to observe how all this legislation was to make true in fact what was already written in Article IV that "citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." *Cong. Globe*, 39th Cong., 1st Sess., App. 67 (1865) (Representative Garfield). It was the intent of the Fourteenth Amendment Privileges or Immunities Clause not to create new rights, but to protect preexisting rights from state interference and to give express legislative power to the Congress to enforce the privileges of all free citizens that must exist in every State pursuant to Article IV. *Cong. Globe*, 39th Cong., 1st Sess. 1034 (1865) (Representative Bingham). The Amendment, said Bingham, "is a direct, affirmative delegation of power to Congress to carry out the principles of all these guarantees, a power not found in the Constitution." *Id.* at 2766. Not everyone agreed with Bingham, of course, that Congress lacked original power to enforce Article IV, but the Fourteenth Amendment would eliminate all doubt and would make it express. The Amendment did, but Justice Miller in *Slaughter-House* substituted his view for that democratically chosen.

Whether or not it is too late in the day to reconsider *Slaughter-House* is a matter of some debate.[6] Perhaps, as

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[6] See, e.g., Philip B. Kurland, *The Privileges or Immunities Clause "Its Hour Come Round at Last"?*, 1972 Wash. U. L.Q. 405;

Justice Thomas has suggested in scholarly writing, see Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 Harv. J.L. & Pub. Pol'y 63, 68 (1989) (the rights protected by the Privileges or Immunities Clause are fundamental to the American regime and the best protection against the "willfulness of both run-amok majorities and run-amok judges." *Id.* at 63-64), this debate is now an unnecessary one. The debate is only unnecessary, however, if one correctly perceives – as we believe Justice Thomas does – that the rights of national citizenship in Article IV, including the right to migrate, are unaffected by the *Slaughter-House* decision and are binding upon one's own State. See generally Douglas W. Kmiec & Stephen B. Presser, *The American Constitutional Order* 1079-1116 (1998). In this regard, we also owe much to Justice O'Connor for confirming in *Zobel* the continued life of these unenumerated, but common law-grounded privileges by making explicit reference to the post-*Slaughter-House* case law that reveals the substantive and nondiscriminatory character of Article IV. Justice O'Connor noted, for example, that "in *United States v. Wheeler*, 254 U.S. 281, 297-98 (1920), the Court found that the Clause fused two distinct concepts: (1) 'the right of citizens of the States to reside peacefully in, and to have free ingress into and egress from' their own States, and (2) the right to exercise the same [substantive] privileges in other States." *Zobel*, 457 U.S. at 80.

Wheeler involved the validity of a federal indictment brought against private individuals for seizing and holding persons residing in Arizona and transporting them by

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Clint Bolick, *Unfinished Business: A Civil Rights Strategy for America's Third Century* 76 (1990).

rail to New Mexico. The indictment was quashed for lack of federal power to address private, rather than state, action. In reaching this result, the Chief Justice pursued a "wide field of inquiry common to all the contentions" and answered each with the principles associated with the constitutional doctrine of the Privileges and Immunities Clauses in both Article IV and the Fourteenth Amendment. *Wheeler,* 254 U.S. at 293. Such principles, said the *Wheeler* Court, are "so well founded and so conclusively sustained by authority as to be indisputable." *Id.*

And what are these undisputed principles? *Wheeler,* notwithstanding the interruption of *Slaughter-House,* relies upon the pre-*Slaughter-House* opinion of *Ward v. Maryland,* 79 U.S. (12 Wall.) 418 (1871), where it is established that the words privileges and immunities

> [b]eyond doubt . . . are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade or business without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the State; and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens.

Id. at 430. Plainly, *Wheeler* does indeed acknowledge what Justice O'Connor's reasoning in *Zobel* implies; namely, that the Privileges and Immunities Clause contains two elements – one substantive and one non-discriminatory. The *Wheeler* opinion even has a more congenial understanding of *Slaughter-House.* Unlike the modern casebook characterization of *Slaughter-House,* which reads the

majority opinion in light of the fiery dissents as having created a previously unknown and insupportable state/federal distinction between the two guarantees of privileges and immunities, with the federal privileges being almost meaningless, *Wheeler* explains that *Slaughter-House* was largely making the point that the source of privileges and immunities was not the federal government, but the fundamental rights of all free citizens embodied in specific applications of the common law of the States. This is a point later reaffirmed by Justices Goldberg and Douglas in *Bell v. Maryland,* 378 U.S. 226, 255 (1964) (purpose of the Fourteenth Amendment was to protect "the rights and guarantees of the good old common law"). Most importantly, in deciding that Article IV reaches deprivations of privileges and immunities by states, rather than by private individuals, the *Wheeler* Court makes clear that were a State to enact provisions "incompatible with its existence as a free government and destructive of the fundamental rights of *its* citizens, . . . the existence of federal power to determine the repugnancy of such action to the Constitution . . . are not disputed." *Wheeler,* 254 U.S. at 299 (emphasis added).

In the remaining portions of this brief, we make it plain that California has not transgressed any privilege or immunity by declining to immediately increase the welfare benefits of newcomers to her State beyond the level they received from their prior States. We are confident that the Court will reach the same conclusion. However, it bears emphasis that this result follows not because there are no privileges and immunities, but importantly and more modestly, because a claim for an increased level of public assistance from one's newly adopted State cannot be said to be a fundamental right derived from the

text of the Constitution or long-settled common law traditions. *Shapiro*'s rationale to the contrary is mistaken and presently leads to a confusing body of precedent described aptly as a "doctrinal mess." See, e.g., Zubler, *supra* at 893. The escape from this mess can be found in faithfulness to constitutional text and history, not wholesale abandonment of the privileges and immunities that made that history a possibility.

II. THE IMPROVISED EQUAL PROTECTION RIGHT TO TRAVEL RATIONALE IN *SHAPIRO V. THOMPSON* IS NOT A FAITHFUL REPRESENTATION OF THE RIGHT TO MIGRATE UNDER THE TEXTUAL PRIVILEGES AND IMMUNITIES CLAUSES, IS OVER-BROAD, AND HAS PROVEN TO BE INCAPABLE OF PRINCIPLED LIMITATION.

When *Shapiro* was decided, the Court failed to properly measure the claimed right to travel under the existing Privileges and Immunities Clauses, or for that matter, any other part of the Constitution. ("We have no occasion," wrote Justice Brennan, "to ascribe the source of this right to travel interstate to a particular constitutional provision." *Shapiro*, 394 U.S. at 630.) Instead, the Court fashioned a new equal protection right, nominally premised upon travel, but actually covertly requiring some level of mandated welfare assistance. In *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 261 (1973), the Court, itself, described the *Shapiro*-created right to travel as ensuring new residents "the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents."

A. A welfare subsidy disguised as a travel right.

While the *Shapiro*-created right may at first blush sound similar to the dual nondiscrimination and substantive natural right purposes of the Privileges and Immunities Clauses, closer examination reveals it to be a subtle counterfeit. Neither in history, text, nor common law tradition can one find a right to "vital government benefits." There is no constitutionally-imposed welfare subsidy guarantee. Without a grounding in constitutional text or historical tradition delimiting such right, it is impossible to predict where it will turn up or to what it will relate.

The Constitution and the traditions of this Nation preserve many rights that are fundamental in nature and that cannot be abridged. While the right to migrate to another state to pursue one's chosen profession is one of these rights, a constitutionally-mandated entitlement to higher welfare benefits in one's new State of residence is not among them. The importance of a well-conceived welfare policy, as a matter of both private charity and modern federal and state legislative judgment, cannot be questioned. Yet, whether new residents of a State are entitled to an increase in benefits over the level of their prior State as is claimed in this case is a question to be resolved in legislative chambers, not in courts.

On three separate occasions, the Court has stated that citizens cannot demand, on the basis of constitutional text or history, financial subsidies. In *Dandridge v. Williams*, 397 U.S. 471 (1970), *Lindsey v. Normet*, 405 U.S. 56 (1972), and *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), the Court held that housing, welfare, and education were not fundamental rights. Most directly, in *Dandridge*, the Court stated that even though the administration of welfare benefits involve "the most basic economic needs"

there is no basis for applying heightened scrutiny under the Constitution to benefit level decision-making. *Dandridge*, 397 U.S. at 485.

This lack of a constitutional origin for welfare claims does not render the federal government heartless or uncaring of the less fortunate. Rather, it makes the provision of assistance a matter entrusted to the people through their elected representatives and therefore does not affect the freedoms guaranteed by the Bill of Rights or the Fourteenth Amendment. See *Dandridge*, 397 U.S. at 487 ("The Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.").

B. *Shapiro*'s created right to travel is over-broad and unworkable.

In dissent in *Shapiro*, Justice Harlan quickly saw the flaw in the Court's newly created welfare-right to travel: "Virtually every state statute affects important rights. . . . and to extend the 'compelling interest' rule to all cases in which such rights are affected would go far toward making this Court a 'super legislature.' " *Shapiro*, 394 U.S. at 661 (Harlan, J., dissenting). The difficulty was compounded because *Shapiro* did not define what type of restriction would constitute a "penalty" on its new-found right. In *Shapiro*, the Court, without apparent recognition of contradiction, both asserted that a temporary deprivation of one of the "necessities of life" constituted a penalty and that some undefined durational residency requirements "may not be penalties upon the exercise of the constitutional right of interstate travel." *Id.* at 627, 638 n.21.

In an attempt to tame its creation, the Court in *Maricopa* sought to distinguish necessities from non-necessities. In that case, the Court asserted a distinction between education (a non-necessity) from non-emergency medical care (a necessity). See 415 U.S. at 260 n.15. While the distinction as a matter of enlightened personal philosophy may be unexceptional, it is nonetheless a non-constitutional one. These narrowing efforts again illustrate that in application the new right has had less to do with travel or migration than with the judiciary's imposition of *its* conception of what levels of basic necessity must be provided by the legislative departments of government, whether the people of the State consent or not.

Moreover, *Shapiro* can be fairly read to mandate, under heightened scrutiny, a compelling state interest for any refusal not to deliver welfare benefits at a level at least as high as the most generous State. See Thomas R. McCoy, *Recent Equal Protection Decisions – Fundamental Right to Travel or "Newcomers" as a Suspect Class*, 28 Vand. L. Rev. 987, 999 (1975). As Professor McCoy observes, the *Shapiro* rule

> would seem to apply any time a state or political subdivision of state offers lower quality schools than those available in some other state, has less garbage collection than that available in some other state, provides more limited water and sewer service than that available in some other state, contains lower quality roads than those provided in some other state, or charges higher state university tuition than that charged for a comparable education in some other state. Travelers from those other states will suffer a loss in benefits of residence in the new state as compared with those available in the old and thus

> experience precisely the same sort of disincentive to travel as that experienced by the plaintiffs in *Shapiro*.

Id. at 999-1000. If Professor McCoy is correct, Justice Harlan in his *Shapiro* dissent understated his concern about the Court becoming a "super-legislature"; the Court would have become the ultimate legislature.

C. *Shapiro* is not capable of principled limitation.

Justice Marshall's attempt in *Maricopa* to limit the effective sweep of *Shapiro* to a judicial conception of "basic necessities" illustrates that principled limitation of this constitutionally-ungrounded doctrine is unavailing. Every state, as a matter of legislative policy, is motivated to address the basic necessities of its citizens. Nevertheless, States do so in different ways, through different programs, and at different benefit levels to meet the specific economic conditions of each state. State A, for example, might set a qualifying income for general welfare assistance as any citizen making less than $15,000 annually in light of housing, food, and other subsidies available; but State B, reflecting a state policy to provide consolidated welfare assistance without additional programs, may allow general welfare assistance to any citizen with an income less than $10,000 a year. Were a citizen making $11,000 per year in state A to move to state B, his income would exceed the eligibility threshold and thus disqualify him for general welfare. Has he then suffered a penalty with regard to travel-related basic necessities even as no other citizen in state B would qualify at his income level? Since the logical answer is no, Justice Marshall's attempt in *Maricopa* to salvage *Shapiro* is unsuccessful. It merely shifts the judicial *ipse dixit* from whether a one-year wait as in *Shapiro* is severe, to a

judicial weighing of different qualifying incomes or a judicial assessment of what is and is not a basic necessity or to similar judicially unmanageable comparisons.

The Court's other cases attempting to apply the new-found travel right in *Shapiro* are no less troubled, and are largely explainable, if at all, by non-migration related reasons.[7] The Court has also tried to avoid the *Shapiro* difficulty by simply not using it. Thus, in *Zobel v. Williams*, the Court invalidated Alaska's plan for distributing oil windfall revenues based on the length of residency within the State by purportedly applying rational basis review. Certainly, this suggests some recognition on the Court's part that there was a problem with the newly formed travel right created in *Shapiro*, which would have mandated strict scrutiny. Unfortunately, the Court nonetheless went ahead and employed heightened rational basis review anyway to do-in the statute. This left constitutional commentators in total confusion, though they wrote the decision off as idiosyncratic.[8] Of course, it was

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[7] In *Dunn v. Blumstein*, 405 U.S. 330 (1972), the Court held that invalidating a residency requirement for voting depends more upon the fundamental nature of the representative-reinforcing functions of the franchise than intended or actual deterrence on the newly minted right to travel. Indeed, the opinion in *Dunn* confusingly divorces the protection of a supposed travel right from any consideration of a legislative intent to deter migration or whether State law actually has that effect. The elimination of all assessment of a given legislative choice's deterrent effect on migration, however, reveals that what was at issue in *Dunn* was not migration, but the fundamental right to vote.

[8] See, e.g., Laurence H. Tribe, *American Constitutional Law* Section 16-2 (2d ed. 1988) (opining that the decision is "more the result of dissatisfaction with the existing tools of equal protection analysis for dealing with [discrimination against

in *Zobel*, where Justice O'Connor suggested re-connecting the right to travel or migrate to the Constitution. Justice O'Connor concurred in the *Zobel* judgment, but did not have an opportunity to explore at length the history of the Privileges and Immunities Clauses, and specifically to inquire whether Alaska's allocation of a unique windfall could meaningfully be said to fit within the textual or long established common law right to migrate. Rather, assuming the authentic right to migrate to be implicated, Justice O'Connor proceeded to apply heightened review and inquired whether Alaska had substantially demonstrated non-residents to be a peculiar source of evil to be addressed. See *Zobel*, 457 U.S. at 77-78.

It is highly questionable whether the Alaska program in *Zobel* infringed any historically-grounded right to migrate under the Privileges and Immunities Clauses. Arguably, Justice O'Connor's important effort was focused on the greater problem: the re-attachment of the right to migrate to constitutional text. The particular application was thus unimportant, or perhaps, explainable on transitional or corrective *stare decisis* grounds. That Justice O'Connor shared some of this ambivalence, perhaps, is revealed by her dissenting opinion in *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986). *Soto-Lopez* invalidated a civil service employment preference for veterans who had lived in New York at the time they entered the service. The Court struck a similar New Mexico preference the year before, again awkwardly using a type of heightened rational basis review otherwise unknown to the Court's work. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985). *Soto-Lopez* left the *Shapiro*

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newcomers] than of any overall shift in the Court's scrutiny of how well various purposes fit legislatively chosen means.").

right to travel in shambles, with a plurality feebly trying to revive it. Chief Justice Burger and Justice White concurred on rational basis grounds, with Justices O'Connor, Rehnquist, and Stevens pointing out the obvious: New York's statute had an easily identifiable rational basis – an expression of gratitude to state citizens who were doing the State's part to pick up the hardship of national military service – and the right to migrate contained in the Privileges and Immunities Clause of Article IV was not implicated. See *Soto-Lopez*, 476 U.S. at 920-25.

D. California's two-tier welfare structure has a rational basis.

California has an ample rational basis for its two-tier benefit structure, and as suggested throughout, the textually-based and tradition-informed Privileges and Immunities Clause right to migrate is not infringed. Moreover, the rationality of this policy is reinforced by the fact that Congress expressly authorized California's two-tier welfare structure in the Personal Responsibility and Work Opportunity Act of 1996 (PWORA). See 42 U.S.C. § 604(c) (Supp. 1997).

Empirical evidence suggests that States ought not be denied the ability to experiment with different welfare levels. Imposing uniformity borne of *Shapiro*'s specious travel right may cause a "race to the bottom" where each State defensively preserves existing welfare resources by lowering benefits. Since 1970 and the Court's decision in *Shapiro* the year before, general welfare benefits have declined steadily to a post-war nadir of $349 in 1993. See Paul E. Peterson, *The Price of Federalism* 110 (1995). This is not to assert a direct, but-for causal relationship between *Shapiro* and the observable decline, but it is to suggest that no reasonable state welfare administrator can afford

to avoid making this rational inquiry. At a minimum, an administrator desirous of conducting a well-managed program with limited fiscal resources will need to keep a reasonable eye on the number of people capable of being effectively assisted. This is particularly true since statistics show that after five years a high benefit level state will have a poverty rate approximately one percentage point higher than a similar state with low welfare benefits. See Paul Peterson, *Devolution's Price*, 14 Yale J. on Reg. 111 (1996). In a state as populous as California, this translates into thousands of additional welfare recipients. Additionally, studies have shown that for every $100 difference in the welfare benefit levels of neighboring states, the high benefit level state would be effectively forced to reduce its benefit level for residents by $30 to hold expenditures constant. See *id.* at 117. Overall, the statistics reveal that high welfare levels like California's, which at present are the fifth highest in the Nation, are "magnetic" in that they both dissuade the poor from leaving a state and attract additional poor into a state.[9]

Opponents of two-tier residency requirements attempt to assail the rationale of a two-tier benefit structure as "exclusionary." But this pejorative label adds nothing but atmosphere, and it certainly obscures the prudence implicit in a State seeking to apportion benefits in a manner cognizant of limited budgets and an existing

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[9] See Paul Peterson, *Welfare Magnets* 20 (1990); Rebecca Blank, *The Effect of Welfare and Wage Levels on the Location Decisions of Female Headed Households*, 24 J. of Urban Econ. 186 (1986); see also Edward Gramlich & Deborah S. Laren, *Migration and Income Redistribution Responsibilities*, 19 J. of Hum. Res. 489 (1984).

population already reliant upon its assistance. It is no more irrational for a State to mitigate the growth of its welfare budget than it is to mitigate provable environmental harms by reasonable land use decisions, coordinating growth (due in part to interstate migration) with existing physical resources. Both are local decisions, and absent infringement of a textual property right or one identified by an antecedent inquiry into a State's common law of property, entitled to the deference of this Court. Without the ability to structure benefit levels in tiers to moderate demand burdens on the existing system, States are likely to reduce benefits across the board.[10] Indeed, the empirical work dealing with welfare benefit levels suggests that without a two-tier residency structure, States would be tempted to pursue greater *denials* of benefits to all residents which "might deter migrants who are moving to another job in the new state." F.H. Buckley and Margaret F. Brinig, *Welfare Magnets: The Race for the Top*, 5 Sup. Ct. Econ. Rev. 141, 176-77 (1997). In this sense, California's two-tier structure is not only rational, but it is also the very means by which a burden on the genuine right to migrate is preserved – that is a right exercised in pursuit of "the liberty . . . to work in an honest calling and contribute by your own toil in some sort to the support of yourself, to the support of your fellowmen,

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[10] As a recent study observed: "[i]t is disingenuous to claim that devolution [of welfare responsibilities in the federal system] will result in a competition to cut benefits, and then to deny states the power to cure the problem through reasonable residency standards." F.H. Buckley and Margaret F. Brinig, *Welfare Magnets: The Race for the Top*, 5 Sup. Ct. Econ. Rev. 141, 176 (1997) (expressly approving of the California two-tier plan and even suggesting that Congress give some thought to mandating it).

and to be secure in the enjoyment of the fruits of your toil." *Cong. Globe*, 42d Cong., 1st Sess., App. 86 (1871) (Representative Bingham).

The Equal Protection Clause is designed to reach invidious classifications. It is not intended as a universal substitute for the enforcement of other fundamental constitutional guarantees. Whether or not a given classification offends a fundamental right depends entirely upon the definition of that right as outlined in the traditions and customs of the Nation. In this instance, history reveals the right to migrate to engage in commerce, trade, or business predates the Constitution; but the right asserted here by respondents – to receive a higher level of welfare benefits from one's new State of residence – is by no means a right rooted in our Nation's history or tradition.

E. The Court should abandon *Shapiro's* constitutionally problematic framework.

For the reasons advanced by petitioners, the Court could uphold the California statute in this case while plausibly avoiding the practical difficulties and the infringement on democratic State authority occasioned by *Shapiro*. This has been the lot of the lower courts, and it has avoided some, but not all, of the absurdities invited by *Shapiro*.[11]

The Court, however, should not follow this path. In doing so, it would be treating only the symptom of the

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[11] Compare *Jones v. Milwaukee County*, 485 N.W.2d 21 (Wis. 1992) (upholding a sixty day denial of all welfare assistance as not a penalty because it is so much less than one year) with *Mitchell v. Steffen*, 504 N.W.2d 198 (Minn. 1993) (invalidating a lower welfare level for the first six months as a penalty).

constitutional virus implanted by *Shapiro*. As one lower federal court observed:

> Many scholars have criticized the Supreme Court's right to travel jurisprudence . . . advancing many cogent reasons as to why *Shapiro v. Thompson* [citation omitted], the leading case in this area, should be overruled or at least substantially modified. [citing authorities]. . . . Many scholars criticize the *Shapiro* Court for issuing a decision that was an exercise in judicial policymaking rather than textual interpretation of the Constitution. Further, many scholars claim that the right to travel jurisprudence is unsettled and fractured because the *Shapiro* Court failed to base the right to travel on a specific textual provision of the Constitution. This Court would tend to agree with this proposition. The Supreme Court's failure to ground the right to travel in a particular provision of the Constitution has led to an unreasoned application of this doctrine because the lower federal courts must apply this right to travel jurisprudence without fully considering the purposes behind the right to travel within its proper textual context.

Maldonado v. Houstoun, 177 F.R.D. 311, 323 n.11 (E.D. Pa. 1997). Seldom is such an explicit judicial S.O.S. given. We respectfully suggest that while rescue in this case might be accomplished by the puny raft of legalistic distinction, both the need of lower courts for more explicit guidance and respect for text, history, and State authority demand a refreshed constitutional vessel.

CONCLUSION

For the foregoing reasons, *amicus* Institute for Justice respectfully requests that the decision of the Ninth Circuit be reversed, and in doing so, that this Court clarify the constitutional foundation of the right to migrate to make it clear that this right is grounded in the Privileges and Immunities Clauses of the Constitution.

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